

2022–2023–2024

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

EXPOSURE DRAFT EXPLANATORY MATERIALS

TBA

EXPLANATORY MEMORANDUM

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EXPOSURE DRAFT

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ASIC Act	<i>Australian Securities and Investments Commission 2001</i>
CCA	<i>Competition and Consumer Act 2010</i>
CCIV	Corporate Collective Investment Vehicle
Corporations Act	<i>Corporations Act 2001</i>
DGR	Deductible Gift Recipient
FATA	<i>Foreign Acquisitions and Takeovers Act 1975</i>
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
PRRTA Act	<i>Petroleum Resource Rent Tax Assessment Act 1987</i>
PRRTA Regulations	<i>Petroleum Resource Rent Tax Assessment Regulations 2024</i>

Chapter 1: Miscellaneous and Technical amendments

Outline of chapter

- 1.1 Schedule # to the Bill makes a number of miscellaneous and technical amendments to Treasury portfolio legislation. The amendments demonstrate the Government's ongoing commitment to the care and maintenance of Treasury portfolio legislation.
- 1.2 The amendments update legislative references, repeal inoperative provisions, simplify provisions and reduce red tape.

Context of amendments

- 1.3 Miscellaneous and technical amendments are periodically made to Treasury portfolio legislation to correct drafting errors, repeal inoperative provisions, address unintended outcomes and make other technical changes. The amendments are part of the Government's ongoing commitment to the care and maintenance of Treasury portfolio legislation.
- 1.4 The miscellaneous and technical amendments process was first supported by a recommendation of the 2008 Tax Design Review Panel, which was appointed to examine how to reduce delays in the enactment of tax legislation and improve the quality of tax legislation. The miscellaneous and technical amendments process has since been expanded to all Treasury portfolio legislation.

Summary of new law

- 1.5 The miscellaneous and technical amendments maintain and improve the quality of Treasury legislation by:
 - repealing redundant and inoperative provisions;
 - enhancing readability and administrative efficiency;
 - reducing unnecessary red tape; and
 - making other technical changes.

Detailed explanation of new law

Part 1 – Amendments commencing day after Royal Assent

Division 1 – Australian Securities and Investments Commission Act 2001

- 1.6 Division 1 of Part 1 of Schedule # to the Bill repeals provisions in the ASIC Act which require the Minister to consent to certain proceedings.
- 1.7 Subsections 12AC(2) to 12AC(4) of the ASIC Act provide that a proceeding involving conduct outside of Australia may only proceed with the consent of the Minister. This mirrors former subsections 5(3), (4) and (5) in the CCA.
- 1.8 The analogous provisions in the CCA were repealed in 2017 following recommendations made by the Harper Review, which found the requirement for Ministerial consent represented unnecessary red tape to private litigants.
- 1.9 The amendments repeal subsections 12AC(2) to 12AC(4), aligning the ASIC Act with the CCA to reduce the burden on litigants seeking redress under the ASIC Act.
[Schedule #, items 1 and 2, subsection 12AC(1) and subsections 12AC(2) to (4) of the ASIC Act]

Division 2 – Contents of annual financial reports

- 1.10 Division 2 of Part 1 of Schedule # to the Bill amends reporting requirements for public companies in the Corporations Act.
- 1.11 Subsection 295(3A) of the Corporations Act improves tax transparency by ensuring public companies disclose the tax residency of their subsidiaries in their consolidated entity disclosure statement as part of their annual financial reports. The provisions align these disclosures with income tax return disclosures, to improve multinational tax transparency. The amendments apply for financial years commencing on or after 1 July 2024.
- 1.12 The amendments clarify the tax residency disclosures required for subsidiaries in the annual financial report. A reporting entity must disclose whether each of its subsidiaries were an Australian tax resident and each foreign jurisdiction for which each of its subsidiaries were a tax resident (if any).
[Schedule #, item 3, subparagraphs 295(3A)(a)(vi) and (vii) of the Corporations Act]

- 1.13 For subsidiaries that were a tax resident in Australia and in one or more foreign jurisdictions, reporting entities are required to disclose that they were both an Australian resident under Australian law and a foreign resident under the law of each relevant foreign jurisdiction. These entities will therefore need to disclose that they were an Australian resident and also list the foreign jurisdiction(s) of which they were a resident.
- 1.14 Further, the amendments clarify the conditions for when an entity is an Australian resident for the purposes of subsection 295(3A) of the Corporations Act. The term ‘Australian resident’, as defined in subsection 995-1(1) of the ITAA 1997 means a person who is a resident of Australia for the purposes of the ITAA 1936. The definition of ‘resident’ or ‘resident of Australia’ in subsection 6(1) of the ITAA 1936 applies to individuals and companies but does not extend to partnerships and trusts.
- 1.15 Accordingly, paragraphs 295(3B)(b) and (c) clarify that subsidiary partnerships and trusts are covered by the disclosure requirements. They do this by confirming that a partnership and a trust will be an ‘Australian resident’ for the purposes of subsection 295(3A) of the Corporations Act, in the following circumstances:
- For a partnership: where at least one member of the partnership is an Australian resident (within the meaning of the ITAA 1997) at that time; and
 - For a trust: where the trust is a resident trust estate (within the meaning of Division 6 of Part III of the ITAA 1936) in relation to the year of income that corresponds to the financial year.

[Schedule #, item 4, subsection 295(3B) of the Corporations Act]

- 1.16 The definitions in paragraphs 295(3B)(b) and (c) of the Corporations Act refer to tax residency definitions in the ITAA 1997 and the ITAA 1936, allowing reporting entities to rely on their existing income tax reporting obligations to complete these disclosures.
- 1.17 Corporate Limited Partnerships, as defined in section 94D of the ITAA 1936, should be reported as Australian residents under paragraph 295(3B)(a) where they are a resident of Australia under section 94T of the ITAA 1936, consistent with income tax return disclosures. Corporate Limited Partnerships are generally referred to as ‘companies’ in the income tax law under section 94J of the ITAA 1936, and are not included in the definition in paragraph 295(3B)(b) of the Corporations Act. Corporate Limited Partnerships are generally referred to as ‘companies’ in the income tax law under section 94J of the ITAA 1936 and are not included in the definition in paragraph 295(3B)(b) of the Corporations Act. The residency status of other partnerships is to be determined under paragraph 295(3B)(b).

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- 1.18 In some circumstances, the concept of tax residency may not apply to a reporting entity's subsidiary. For example, where the subsidiary is not an Australian resident, and there is a lack of a corporate tax system in the foreign jurisdiction in which the subsidiary is established and operates. In these circumstances, the reporting entity should state that the subsidiary is not an Australian resident but should not list the relevant foreign jurisdiction for that subsidiary for the purposes of subparagraphs 295(3A)(a)(vi) and (vii). This should only arise in limited circumstances where the subsidiary is not an Australian resident under subsection 295(3B) and where the tax residency of other foreign jurisdictions do not apply to the subsidiary as a tax resident of that country. For example, it is currently possible for an entity to be neither an Australian resident nor list any foreign jurisdiction under subparagraphs 295(3A)(a)(vi) and (vii), where that entity is established and operated in the Cayman Islands.
- 1.19 This amendment applies in relation to annual financial reports for financial years commencing on or after 1 July 2024. This ensures that this amendment will have no retrospective impact, as the first annual report is expected after 30 June 2025. These amendments clarify the technical operation of the existing law, which supports the policy intention of increased scrutiny on Australian public companies and how they structure their subsidiaries in different jurisdictions (including for tax purposes). This amendment aligns with the Government's multinational tax integrity commitments.
[Schedule #, item 5, section 1709 of the Corporations Act]

Division 3 – Foreign Acquisitions and Takeovers Act 1975

- 1.20 Division 3 of Part 1 of Schedule # to the Bill amends the FATA to clarify the calculation of penalties for contraventions of subsection 95(4) of the FATA.
- 1.21 Subsection 95(8) of the FATA selects the interest to be used as reference when calculating the maximum civil penalty applicable for a breach of subsections 95(1) and 95(4) of the FATA. Subsection 95(1) prohibits temporary residents from holding interests in more than one established dwelling at a time. Subsection 95(4) prohibits foreign residents from acquiring interests in established dwellings. Subsection 95(7) provides that the maximum civil penalty is the greatest of:
- double the amount of the capital gain that was made or would be made on the disposal of the interest selected by paragraph (8); or
 - 50% of the consideration for the acquisition of that interest; or
 - 50% of the market value of that interest.
- 1.22 The amendments clarify the selection of interests with respect to breaches of subsection 95(4), to promote consistency with the contravention provision. As

the contravention is established by acquisition of an interest, the civil penalty is calculated by reference to the interest which was acquired in contravention of subsection 95(4).

[Schedule #, item 8, subsection 95(9) of the FATA]

- 1.23 To avoid doubt, there are no changes to the selection of the interest with respect to breaches of subsection 95(1) of the FATA.
- 1.24 Subsections 95(7) and 95(8) are amended to clarify that subsection 95(8) applies with respect to breaches of subsection 95(1).
[Schedule #, items 6 and 7, subsections 95(7) and 95(8) of the FATA]
- 1.25 This amendment applies with respect to contraventions of subsection 95(4) on or after the day after Royal Assent.
[Schedule #, item 9]

Division 4 – Assessable petroleum receipts worked out according to regulations

- 1.26 Division 4 of Part 1 of Schedule # to the Bill amends section 26 of the PRRTA Act to remove the reference to paragraph 24(1)(e) of the PRRTA Act.
[Schedule #, item 10, section 26 of the PRRTA Act]
- 1.27 Paragraph 24(1)(e) of the PRRTA Act provides that the amount of assessable petroleum receipts derived by a person is worked out in accordance with the regulations in relation to a petroleum project where:
- the regulations apply to any sales gas produced from the project petroleum; and
 - that sales gas becomes an excluded commodity otherwise than by virtue of being sold or certain other things.
- 1.28 Section 24 of the PRRTA Regulations then sets out how such persons work out the amount of assessable receipts they derived in relation to a petroleum project.
- 1.29 As paragraph 24(1)(e) of the PRRTA Act provides the amount of assessable petroleum receipts derived by a person in relation to a petroleum project in certain cases, the amendment is made to clarify that no apportionment of that amount is required under section 26 of the PRRTA Act. Accordingly, the reference to paragraph 24(1)(e) in section 26 of the PRRTA Act is removed.
- 1.30 The amendments apply in relation to a year of tax beginning on or after 1 July 2024.
[Schedule #, item 11]

Part 2 – Amendments commencing first day of the next quarter

Division 1 – General class investors

- 1.31 Division 1 of Part 2 of Schedule # to the Bill amends the ITAA 1997 to ensure the thin capitalisation rules in Division 820 of that Act operate as intended.
- 1.32 Schedule 2 to the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Act 2024* made several reforms to the thin capitalisation rules in Division 820 of the ITAA 1997. The amendments in Schedule 2 to that Act generally apply in relation to assessments for income years starting on or after 1 July 2023.
- 1.33 As part of the reforms, changes were made to how some entities are categorised under the thin capitalisation rules. However, certain consequential amendments to ensure these entities are correctly categorised were not made. These amendments make these consequential amendments.
- 1.34 The amendments ensure that associate entities of general class investors are correctly categorised for thin capitalisation purposes. Depending on the case, the amendments ensure that such entities are correctly categorised as either:
- a general class investor;
 - an outward investing financial entity (non-ADI); or
 - an outward investing entity (ADI).

[Schedule #, items 12, 13 and 14, subsection 820-85(2BA), subparagraph 820-300(2AA) of the ITAA 1997]

- 1.35 Correctly categorising entities ensures they are subject to the appropriate and intended thin capitalisation rules for their category.
- 1.36 The amendments apply in relation to income years starting on or after 1 July 2023. Retrospective application of the amendments is consistent with the application of the relevant reforms and ensures that the thin capitalisation rules operate as intended.
- [Schedule #, item 15]***
- 1.37 For completeness, the intended re-categorisation of entities under the recent reforms is set out in the below table.

Table 1.1 Comparison of categorisations

Old categorisation	New categorisation
outward investor (general)	general class investor
outward investor (financial)	outward investing financial entity (non-ADI)
inward investment vehicle (general)	general class investor
inward investment vehicle (financial)	inward investment vehicle (financial)
inward investor (general)	general class investor
inward investor (financial)	inward investor (financial)
outward investing entity (ADI)	outward investing entity (ADI)
inward investing entity (ADI)	inward investing entities (ADI)

Division 2 – Deductible gift recipients

- 1.38 Division 2 of Part 2 of Schedule # to the Bill updates outdated names of organisations listed on the DGR register.
- 1.39 The income tax law allows taxpayers who make gifts of \$2 or more to DGRs to claim a deduction. To be a DGR, an organisation must fall within one of the general categories set out in Division 30 of the ITAA 1997 or be listed by name in that Division.
- 1.40 Three organisations are currently listed as DGRs under outdated names. The amendments make the following changes to address this issue:
- ‘The Royal Society for the Prevention of Cruelty to Animals (South Australia) Incorporated’ updated to ‘Royal Society for the Prevention of Cruelty to Animals (South Australia) Limited’;
 - ‘Alcohol Education and Rehabilitation Foundation Limited’ updated to ‘Foundation for Alcohol Research and Education Limited’; and
 - ‘The Prince’s Trust Australia Limited’ updated to ‘The King’s Trust Australia Limited’.

[Schedule #, items 16, 17 and 18, table items 4.2.9 and 4.2.26 of the table under subsection 3045(2), and table item 13.2.20 of the table under subsection 30105(2) of the ITAA 1997]

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- 1.41 Consequential editorial amendments are also made to the index in Division 30 of ITAA 1997 for these DGRs.
[Schedule #, items 19, 20 and 21, items 49E and 64B of the table under section 30-315 of the ITAA 1997]

Part 3 – Amendments with other commencements

Division 1 – Declaration of relevant relationships

- 1.42 Division 1 of Part 1 of Schedule # to the Bill amends the Corporations Act to align the requirements placed on the liquidator of a CCIV under the Corporations Act with those of liquidators of companies.
- 1.43 Under subsection 60(2) of the Corporations Act, liquidators must make a declaration of relevant relationships. However, the effect of the translation rules (in Chapter 8B of the Corporations Act) relating to CCIVs mean that a liquidator appointed to a sub-fund of a CCIV is not required to make such a declaration if they have previously been appointed to another sub-fund of the same CCIV, despite these relationships carrying the same risk of a conflict of interest.
- 1.44 To correct this, the amendments insert section 1237KA which provides that, for liquidators appointed to sub-funds of CCIVs, the declaration of relevant relationships extends to relationships with other sub-funds of the same CCIV, and relevant entities with relationships with other sub-funds of the same CCIV.
[Schedule #, item 22, section 1237KA of the Corporations Act]
- 1.45 This requirement applies to declarations of relevant relationships made on or after the commencement of section 1710 of the Corporations Act (which is 14 days after Royal Assent). Further, a liquidator of a sub-fund of a CCIV will be required to amend their declaration of relevant relationships upon commencement of section 1710. The delay in commencement provides for a transitional period for liquidators of sub-funds and gives sufficient notice of the date that their declarations need to be updated.
[Schedule #, item 23, section 1710 of the Corporations Act]

Commencement, application, and transitional provisions

- 1.46 Part 1 of Schedule # to the Bill commences on the day after Royal Assent.
- 1.47 Part 2 of Schedule # to the Bill commences on the first day of the next quarter after Royal Assent.

- 1.48 Part 3 of Schedule # to the Bill commences on the day after the end of the period of 14 days beginning on the day after Royal Assent.

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